Petition

81-471

No.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE ENRIQUE MARQUEZ-AMAYA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

CARTER G. PHILLIPS
Assistant to the Solicitor General

CAROLYN L. GAINES
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the government violates a defendant's right to due process or compulsory process by deporting illegal aliens found near the scene of an offense after officials of the government have interviewed the aliens and concluded that they can provide no evidence material to the case.

2. Whether a defendant should be required to show that he made reasonable efforts to procure the attendance of the missing witnesses at trial or otherwise make their testimony available as a condition to dismissal of the indictment on account of the deportation of the witnesses.

3. Whether, assuming that the conduct of the government violated the defendant's rights, dismissal of the indictment prior to trial is the appropriate remedy when the defendant cannot demonstrate actual prejudice caused by the absence of the witnesses.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE ENRIQUE MARQUEZ-AMAYA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum of the court of appeals (App. A, *infra*, 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 3a) was entered on March 19, 1981. A petition for rehearing was denied (App. C, *infra*, 4a) on June 16, 1981. On August 5, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including September 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * *.

STATEMENT

Respondent was indicted with co-defendant Salcedo-Ceniceros for distributing heroin, in violation of 21 U.S.C. 841(a)(1) and (b) and 18 U.S.C. 2 (Count 1), and for conspiring to distribute heroin, in violation of 21 U.S.C. 846 (Count 2). The district court dismissed both counts of the indictment against respondent (App. D, *infra*, 5a), and the court of appeals affirmed (App. A, *infra*, 1a-2a).[1]

1. At 7:00 p.m. on March 31, 1980, an informant for the Drug Enforcement Administration called DEA Agent Rocco J. Andresano, Jr. and told him that two individuals at the informant's place of business had a pound of heroin they wanted to sell (Tr. 25).[2]

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[1] The district court denied Salcedo-Ceniceros' motion to dismiss his indictment. He was tried and convicted on both counts, and his conviction was affirmed on appeal (App. A, *infra*, 1a-2a).

[2] "Tr." denotes the transcript of proceedings held on June 2, 6, 9 and 18, 1980. Actual hearings were held only with regard to Salcedo-Ceniceros' motion. The district court dismissed respondent's indictment without hearing any testimony (Tr. 23). "App. Rec." denotes the excerpt of record filed with the court of appeals in this case.

The informant later identified the two individuals as respondent and his co-defendant (Tr. 25-26).

Agent Andresano negotiated the sale of the heroin through the informant. Andresano told the informant what he wanted, and the informant conveyed the message in English to Salcedo-Ceniceros, who translated it to respondent in Spanish (Tr. 27-28). Through this process Andresano agreed to purchase the whole pound of heroin. He also agreed to meet first at the informant's place of business to show his money (Tr. 29), and to make the actual purchase later at a trailer in Yuma, Arizona (Tr. 27). Andresano was told that there were two women in the trailer, but that they knew nothing about "what was going on" (*ibid.*).

Andresano then went to the Yuma Narcotics Task Force Office, picked up $29,000 "for show," and made arrangements to be followed by other agents while he made the purchase (Tr. 28-29). He then met the informant and Salcedo-Ceniceros, showed them his money, and negotiated the price for the heroin (Tr. 29).

Agent Andresano then drove Salcedo-Ceniceros to a trailer located on a public street in Yuma (Tr. 31) and parked his car about 30 feet from the trailer (Tr. 33). Respondent came out of the trailer, walked up to Salcedo-Ceniceros, and asked in Spanish if everything was all right (Tr. 31-32). When Salcedo-Ceniceros said "okay," respondent went back to the trailer and returned with a paper bag, which he handed into the car (Tr. 32). Inside the bag were four aluminum packages that contained 16 ounces of heroin (*ibid.*). When Andresano saw the heroin, he signaled the other agents, who came and helped with the arrests.

During the time agent Andresano was in his car, he frequently glanced at the trailer to make sure that no one from there attacked him. He saw no one look out of the trailer window (Tr. 33). When the agents entered the trailer after the arrest, they found a woman and her 14-year-old daughter (Tr. 34).

The agents interviewed the two women, both of whom said that they knew nothing about a crime and that they had seen nothing going on (Tr. 15). Satisfied that neither woman could supply any evidence and believing them both to be illegal aliens, the agents turned them over to the United States Border Patrol. They were released back to Mexico the same day.

2. Prior to trial respondent filed a motion to dismiss the indictment on the ground that the deportation of the two women in the trailer denied him his rights to due process and compulsory process. In the papers supporting his motion, respondent asserted that the two witnesses might have been able to supply evidence relevant to his intent (App. Rec. 12). He suggested that they could have testified "as to whether * * * [respondent] was aware of the contents of the brown paper bag" (*ibid.*). In addition, they could have testified that one of the women was respondent's girl friend and that he was at the trailer visiting her. Finally, they could have testified generally about respondent's behavior prior to the sale and perhaps have shown that respondent's "activity was not consistent with one waiting to sell a large quantity of heroin" (*id.* at 12-13). Based on these assertions, respondent concluded that he could conceivably have benefited from the witnesses' testimony, and therefore their deportation prior to trial violated his constitutional rights.

With regard to the availability of the two missing witnesses, the government told the court that respondent's father had an address for them in Mexico (Tr. 5). Respondent offered no explanation as to why they would not return to exculpate him, but stated that respondent's father "said those witnesses are not going to be available" (Tr. 6).

The district court did not respond to the government's request to require respondent to testify to explain exactly what evidence the deported aliens might offer (Tr. 15). Instead, it simply asked the government to argue its position orally. During the argument, the government suggested as an alternative to the dismissal of the indictment that the court suppress all evidence relating to respondent's presence at the trailer and require the prosecution to rely solely upon the informant's testimony (Tr. 19). Respondent objected that this did not remove the disability to his case because the missing aliens could conceivably offer evidence relevant to his general intent and knowledge that would exculpate him (Tr. 20-21).

At the conclusion of the argument, the district court dismissed both the substantive count and the conspiracy count against respondent (Tr. 23). The court of appeals affirmed, stating simply that it had "reviewed the record and conclude[d] that the dismissal was proper" (App. A, *infra*, 2a).[3]

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[3] It is noteworthy that by the time of the appeal, respondent was able to conceive of additional testimony from the deported aliens that might benefit him. He claimed that there was "the distinct possibility that one of the missing witnesses could have directed [respondent] to take the unopened sack out to the car. In other words, * * * one of the missing witnesses could have been the co-defendant's accomplice * * *" (Br. of Appellee 9). Since respondent would have been a witness to any such events, it is difficult to understand why this should have been a matter for supposition by counsel.

REASONS FOR GRANTING THE PETITION

This case presents important questions similar to those presented in our petition for a writ of certiorari in *United States* v. *Valenzuela-Bernal*, No. 81-450 (filed Sept. 3, 1981),[4] concerning the application of the Due Process and Compulsory Process Clauses to the situation in which illegal aliens, who are present at the scene of a crime, are returned to their own country prior to trial.

1. In our petition in *Valenzuela-Bernal*, we argue that the "conceivable benefit" test applied by the Ninth Circuit, while consistent with the approach in the Seventh Circuit,[5] conflicts with decisions of the Fifth Circuit because in essence it requires virtually automatic dismissal of charges whenever a potential witness is deported, whereas the Fifth Circuit requires a concrete showing of likely prejudice.[6]

That the Ninth Circuit's approach is fairly characterized as an "automatic dismissal" rule is well illustrated by this case. The deported aliens plainly did not witness the actual heroin transaction. The most that was suggested to the district court was that they might testify as to the conduct of respondent prior to the heroin sale. There is no evidence

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[4] A copy of our petition in *United States* v. *Valenzuela-Bernal* has been sent to respondent.

[5] *United States* v. *Calzada*, 579 F.2d 1358 (7th Cir.), cert. dismissed, 439 U.S. 920 (1978) (no showing of prejudice required).

[6] *United States* v. *Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980) (a showing of real prejudice required before dismissal of indictment is appropriate). See also *United States* v. *Henao*, No. 80-5145 (5th Cir. Aug. 7, 1981), slip op. 10081; *United States* v. *Arredondo-Morales*, 624 F.2d 681 (5th Cir. 1980).

in this record, however, to suggest either what those witnesses might say or how any statements from them actually could benefit respondent. All that appears in the record is the product of the vivid imagination of the respondent's counsel as to possible, but entirely remote, scenarios. Thus, the Ninth Circuit's approach invites and rewards respondent for suggesting at trial that his girl friend could testify that his behavior was inconsistent with knowledge about the heroin he delivered to a DEA agent and on appeal that his girl friend may have been the real criminal who duped him into making the delivery. If unsubstantiated assertions such as those in this case are all that is required for the dismissal of an indictment, then the conclusion seems inescapable that, contrary to the express holdings of the Fifth Circuit, no real prejudice need be demonstrated in the Ninth Circuit for dismissal of the indictment when an alien witness has been deported.[7]

2. This case presents the additional question, not involved in *Valenzuela-Bernal*, whether the remedy of dismissal (assuming it is otherwise appropriate) should be conditioned upon a satisfactory showing by the defendant that diligent efforts to locate the deported witnesses and secure their testimony have

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[7] For reasons that are more fully developed in our petition in *Valenzuela-Bernal*, the approach of the Ninth Circuit in these cases is inconsistent with principles announced in this Court's decision in *Roviaro* v. *United States*, 353 U.S. 53 (1957). The analysis employed in *Roviaro* suggests that the present, analogous issue should be decided on the basis of a careful balancing of the defendant's need for the information against the government's interests in not having to sustain (and impose upon large numbers of apprehended aliens) the ever-increasing burden of confining for extended periods of time "witnesses" who have been charged with no crime.

been unsuccessful.[8] The record of this case reflects that respondent apparently was well acquainted with the women in the trailer, one of whom he described as his girl friend. In addition, he knew their address in Mexico, but he did no more to secure their presence than state to the court that they would be unavailable. Obviously, dismissal would be completely unwarranted if the deported witness is willing to return for the trial and testify. See *United States* v. *Valdez*, 594 F.2d 725 (9th Cir. 1979); *United States* v. *Neustice*, 452 F.2d 123 (9th Cir. 1971). And even if a witness whose whereabouts are known is unwilling to return, the defendant should be required to produce an affidavit or other evidence of the testimony the witness would give, or a satisfactory explanation for his inability to do so. The court could then assess whether the testimony, had it been available, might raise a reasonable doubt regarding the defendant's guilt. Other options for mitigating any loss due to the witness's deportation, such as a deposition of the witness or a stipulation by the prosecution, could also be explored.

By imposing no requirement of this nature as a precondition to dismissal of an indictment, the Ninth Circuit's decisions actually discourage defendants from locating witnesses and encourage them to attempt to dissuade potential witnesses from returning. Particularly in a case such as this, where the defendant and the witnesses are not strangers, the orderly administration of justice dictates that the defendant be required, before being relieved of prosecution for a serious offense, to make some showing as to what measures he has taken to obtain the testi-

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[8] In *Valenzuela-Bernal*, both sides had been unsuccessful in their efforts to locate the missing potential witnesses.

mony of the deported witnesses, what in concrete terms that testimony would be, and why the witnesses cannot be produced for the trial.

Similar requirements are imposed in other, related areas of the law. For instance, when a defendant requests a continuance because a witness is unavailable, courts routinely require the defendant to make a clear showing of a good faith effort to locate the witness. See, *e.g.*, *United States ex rel. Lucas* v. *Regan*, 503 F.2d 1, 3 (2d Cir. 1974); *United States* v. *Posey*, 501 F.2d 998, 1000-1001 (6th Cir. 1974). See generally, Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191, 242 (1975).

Similarly, in cases involving the Confrontation Clause, the government may not simply decline to produce a witness even if substitute testimony might be otherwise admissible. Instead, the government must bear the burden of showing why the witness is unavailable and demonstrate that its efforts to locate the witness have been made in "good faith." See *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980); *California* v. *Green*, 399 U.S. 149, 161-162 (1970); *Barber* v. *Page*, 390 U.S. 719, 724-725 (1968). Since the Ninth Circuit presently requires dismissal of the indictment as the appropriate remedy in these deportation cases, a defendant ought to be required to show at least a "good faith" effort to obtain the testimony of the witness before the government's right to prosecute is terminated.

3. Even assuming that respondent's rights have been violated in this case, the decision of the court of appeals upholding dismissal of the indictment against respondent is inconsistent with principles announced by this Court in prior cases. Just this past Term the Court held in a right to counsel case that

"absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *United States* v. *Morrison*, No. 79-395 (Jan. 13, 1981), slip op. 4. The Court announced that the appropriate "approach" is "to identify and then neutralize the taint by tailoring suitable relief appropriate in the circumstances to assure * * * a fair trial." *Ibid.*

The remedy in this case can hardly be described as "tailored." The court dismissed both the substantive count and the conspiracy count. It totally disregarded the government's more reasonable solution, which was to suppress all evidence relating to respondent's presence at the trailer and his participation in the actual transfer of heroin (Tr. 19)—the only matters the deported women could have witnessed. Under this proposal, the government would have had to forego the testimony of the DEA agent and rely solely on the informant's testimony as to respondent's participation in the overall transaction. This would seem to be ample relief for the "violation" alleged (in our view, indeed, far more than respondent was reasonably entitled to).[9] Instead, the court adopted, without any showing that it was nec-

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[9] By dismissing prior to trial, the court also pretermitted consideration of additional measures that would have protected respondent without eliminating the prosecution. Thus, respondent might have been able to take advantage at trial of an "absent witness" instruction. Assuming that respondent chose to bring up the issue of the potential witnesses and that he had satisfactorily demonstrated that he could not procure the witnesses' attendance at trial, he could ask the finder of fact to draw an adverse inference from the fact that the government had made the witnesses unavailable. See 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 17.19 (1977).

essary to avoid any danger of an unjust conviction, the most drastic sanction available, thereby increasing "to an intolerable degree interference with the public interest in having the guilty brought to book." *United States* v. *Blue*, 384 U.S. 251, 255 (1966).

4. In our petition in *Valenzuela-Bernal*, we discussed the substantial burden on government resources, as well as unfairness to incarcerated aliens, created by the Ninth Circuit's approach to cases involving the deportation of potential witnesses. The United States simply cannot keep every illegal alien in prison for substantial periods of time on the hypothesis that they may provide some "conceivable benefit" to some defendant.

The difficulty the Ninth Circuit's rule imposes on the government is best illustrated by comparing this case to *Valenzuela-Bernal*. That case represents the archetypal situation, *i.e.*, illegal aliens being transported unlawfully by the defendant. In that context, the status of the aliens as potential witnesses is at least clear. In this case, by contrast, there was very little to indicate that the illegal aliens had any connection to the criminal activity. The fact that they knew a defendant and happened to be in the general vicinity of the crime hardly constituted strong reason for detaining them after they were interviewed by government officials who concluded that they had no information. Respondent has not even attempted to show that that conclusion was unreasonable or motivated by bad faith.[10]

We are not suggesting that the court of appeals would require every illegal alien who is captured in

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[10] It should be recalled in this connection that the agents had already been told that the two women in the trailer knew nothing about the drug transaction (Tr. 27).

this country to be detained for some period of time because of the mere possibility that he may have witnessed a crime. Obviously, when no connection between an arrested alien and some criminal conduct could be discovered by government officials through any reasonable means, release of the witness could not under any theory violate the defendant's rights. See *United States* v. *Martinez-Morales*, 632 F.2d 112, 116 (9th Cir. 1980). But the instant case still poses unique problems because of the relief granted on the basis of the very slight indication that the deported aliens may have had some relationship with the respondent.

Under the Ninth Circuit's "conceivable benefit" test, it is now hazardous for the government, if it wants to protect its ability to prosecute, to deport a single illegal alien who has even the remotest connection to a criminal defendant. The government is placed in the intolerable situation of either filling its jails with non-criminal alien witnesses or forgoing prosecutions against plainly guilty defendants. Relief from this dilemma is available only from this Court.[11]

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[11] Although this case presents questions that overlap substantially with those presented in our previous petition in *Valenzuela-Bernal*, it also raises additional issues and presents an alternative factual context for evaluating the general problem. If the Court grants our petition in *Valenzuela-Bernal*, it might wish to grant this petition also and set them for argument together in order to consider simultaneously the range of related issues presented by the two cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

CARTER G. PHILLIPS
Assistant to the Solicitor General

CAROLYN L. GAINES
Attorney

SEPTEMBER 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-1503

DC # CR 80-70WPC

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANCISCO SALCEDO-CENICEROS, DEFENDANT-APPELLANT

No. 80-1575

DC # CR 80-70-2

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ENRIQUE MARQUEZ-AMAYA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of Arizona
William P. Copple, District Judge, Presiding
Argued and Submitted March 11, 1981

[Filed Mar. 19, 1981]

MEMORANDUM

Before: KILKENNY and SNEED, Circuit Judges, and GRANT *, District Judge

Appellant Salcedo-Ceniceros was found guilty of aiding and abetting the distribution of heroin, 21 U.S.C. § 841(a)(1) and (b), and conspiring to distribute heroin, 21 U.S.C. § 846(2). Appellant Salcedo-Ceniceros was sentenced to concurrent eight year prison terms with a special parole term of five years.

His appeal asserts that he was denied his right to call witnesses in his defense. We have reviewed the record and conclude that the convictions should be affirmed. The district court's refusal to permit the witness Barrett to be called as a witness deprived appellant Salcedo-Ceniceros of no constitutional right and did not constitute an abuse of discretion on the part of the district court.

The district court dismissed the indictment charging Marquez-Amaya with distributing heroin, 21 U.S.C. § 841(a)(1) and (b), and conspiring to distribute heroin, 21 U.S.C. § 846. The district court acted on the basis of our decision in *United States* v. *Mendiz-Rodriguez*, 450 F.2d 1 (9th Cir. 1971). We have reviewed the record and conclude that the dismissal was proper.

Affirmed.

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* Honorable Robert A. Grant, Senior United States District Judge for the District of Indiana, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1575

DC CR 80-0070-02 WPC

UNITED STATES OF AMERICA, PLAINTIFF/APPELLANT

vs.

JOSE ENRIQUE MARQUEZ-AMAYA,
DEFENDANT/APPELLEE

Appeal from the United States District Court
for the District of Arizona (Phoenix)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
ATTEST

RICHARD H. DEANE
Clerk of Court

by: /s/ Oscar Tagle
Deputy Clerk

Filed and entered March 19, 1981

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1575

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ENRIQUE MARQUEZ-AMAYA, DEFENDANT-APPELLEE

[Jun. 16, 1981]

ORDER

Before: KILKENNY and SNEED, Circuit Judges, and GRANT *, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Robert A. Grant, Senior United States District Judge for the District of Indiana, sitting by designation.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-80-070-PHX-WPC

UNITED STATES OF AMERICA, PLAINTIFF

—vs—

JOSE ENRIQUE MARQUEZ-AMAYA, DEFENDANT

[Filed June 6, 1980]

ORDER

Upon motion of the defendant, Jose Enrique Marquez-Amaya, and good cause appearing therefor,

IT IS HEREBY ORDERED that the indictment is dismissed as to defendant Marquez-Amaya;

IT IS FURTHER ORDERED that bond, if any, is exonerated; and

FURTHER ORDERED releasing defendant Marquez-Amaya from custody.

Done in open Court this 6th day of June, 1980.

/s/ Wm. P. Copple
United States District Judge
District of Arizona

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-80-70 Phx. WPC

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOSE ENRIQUE MARQUEZ-AMAYA, ET AL., DEFENDANT

July 21, 1980

IT IS ORDERED:

The government's motion for reconsideration of the order dismissing the indictment as to defendant Marquez-Amaya is denied.

/s/ Wm. P. Copple
WM. P. COPPLE
United States District Judge

Mailed this 21st day of July, 1980, to:

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Opposition

81-471

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NUMBER _____

UNITED STATES OF AMERICA,

Petitioner

v.

JOSE ENRIQUEZ MARQUEZ-AMAYA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, JOSE ENRIQUEZ MARQUEZ-AMAYA, pursuant to Rule 53, Supreme Court Rules and Title 18, United States Code, §3006A(d)(6), respectively, moves this Honorable Court for leave to file the attached response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Further, Respondent requests, pursuant to Rule 53, Supreme Court Rules, that the undersigned attorney be appointed to represent him in further proceedings before this Court for the reason that the Respondent is financially unable to obtain adequate representation and to meet the necessary expenses in this Court of filing this Response.

RESPECTFULLY SUBMITTED this 27th day of November, 1981.

GAMA AND GUERRERO

By _____
PETER A. GUERRERO
Attorney for Respondent

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

PETER A. GUERRERO, being first duly sworn upon his oath, deposes and says:

1. This Affidavit is made pursuant to Rule 46 of the Supreme Court Rules;

2. That he is the attorney for the Respondent and has represented the Respondent throughout all the proceedings in this matter;

3. That immediately after the case was dismissed in the District Court below, the Respondent returned to Mexico where he is a citizen;

4. That the undersigned has had no further contact with the Respondent, is unable to contact him and has not been paid for any of the representations afforded the Respondent before the Ninth Circuit Court of Appeals and this Court;

5. That because of the foregoing the undersigned requests that he be appointed to represent the Respondent and that this matter proceed in forma pauperis.

P. A. Guerrero
PETER A. GUERRERO

SUBSCRIBED AND SWORN to before me this 27th day of November, 1981.

NOTARY PUBLIC

My Commission Expires:
January 16, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NUMBER_____

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSE ENRIQUEZ MARQUEZ-AMAYA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSE ENRIQUEZ MARQUEZ-AMAYA

Respondent

I N D E X

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NUMBER _____

UNITED STATES OF AMERICA, Petitioner,

v.

JOSE ENRIQUEZ MARQUEZ-AMAYA, Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSE ENRIQUEZ MARQUEZ-AMAYA, by and through his attorney undersigned, respond to the government's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Memorandum of the Court of Appeals (Exhibit "A" attached) is unreported.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). This response is filed pursuant to Rule 24(1) of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Is dismissal proper when the Government unilaterally places a material witness beyond the subpoena power of a Defendant when the Defendant could conceivably benefit from the missing witnesses testimony?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . "

STATEMENT

Respondent was indicted with a co-defendant for distributing heroin in violation of 21 U.S.C. 841(a)(1)(d) and 18 U.S.C. 2, and for conspiring to distribute heroin in violation of 21 U.S.C. §846. The indictment was filed on or about April 16, 1980 and, on May 22, 1980, the Respondent filed his Motion to Dismiss the Indictment alleging that the Government had unilaterally placed two (2) material witnesses beyond the subpoena power of the Respondent by returning them to Mexico thereby denying the Respondent his constitutional rights to due process and compulsory process. (E.R. 4) The Government filed its Response to Defendant's Motion to Dismiss Indictment (E.R. 15) but requested no evidentiary hearing.

On June 6, 1980, the United States District Court below granted Respondent's Motion to Dismiss the Indictment. (E.R. 18)

1. At approximately 7:00 o'clock p.m. on March 31, 1980, DEA Agent Rocco J. Andresano, Jr., had a telephone conversation with a confidential informant. (T.R. 56) The informant advised Agent Andresano that two (2) individuals were present with the informant and wanted to sell a pound of heroin. Agent Andresano told the informant that he wanted to buy the heroin and would meet "these individuals at a specific location in approximately an hour". (T.R. 58)

There was no testimony as to the then identity of the two (2) individuals. At the co-defendant's trial Agent Andresano testified as to a hearsay conversation which he allegedly heard between the confidential informant, a Mexican individual who spoke English and a Mexican individual who spoke Spanish. (R.T. 57, 58) According to Agent Andresano even though he did not hear all of the conversation (T.R. 77, 78), he was able to determine over the telephone that the "non-English-speaking individual" was to take four (4) ounces and go back to a trailer where the heroin transaction was to take place and the confidential informant and the "English-speaking individual" were to meet with Agent Andresano. (R.T. 58) Again, there was no identity at this point in time of either of the two (2) individuals involved.

Agent Andresano then proceeded to gather $29,000.00 from the Yuma Task Force Office and then, under surveillance, drove to a pre-arranged location where he was introduced to the co-defendant Salcedo by the confidential informant. (T.R. 59) From there Mr. Salcedo and Agent Andresano drove to the location in Yuma, Arizona, where the trailer was located. On the way to the trailer co-defendant Salcedo told Agent Andresano that he (Salcedo) could supply him with a pound of heroin every ten (10) days. (T.R. 61) Salcedo also said he could supply the same amounts of cocaine.

When they arrived at the trailer Agent Andresano was told to park in a parking space and wait. After a few moments an individual identified by Agent Andresano as the Respondent exited the trailer came through the gate and walked to the passenger side and asked in Spanish of Mr. Salcedo "if everything was alright".

Mr. Salcedo indicated "yes" in Spanish. (T.R. 63).

The Respondent allegedly then left the passenger side and proceeded back to the trailer. A few moments later he came back out and handed a brown paper sack to co-defendant Salcedo who, in turn, handed it to Agent Andresano. (R.T. 63).

At the time of the transfer of the "paper sack" it was closed. (Preliminary Hearing Transcript, p.20) Agent Andresano never saw the Respondent until he arrived at the trailer. (Preliminary Hearing Transcript, p.8) He never had any negotiations with the Respondent whatsoever. (Preliminary Hearing Transcript, p.8) Prior to the day in question Agent Andresano had never had any previous contact with the Respondent. (Preliminary Hearing Transcript, p.8).

Contrary to the statement in the Petition for Writ of Certiorari there was no testimony as to interviews of the two (2) women who were found in the trailer. They were not taken into custody, however, but were turned over to the United States Border Patrol and released back to Mexico the same day.

2. After Repsondent's counsel determined that the material witnesses found in the trailer were returned to Mexico and were, in fact, beyond his subpoena power and that they were returned to Mexico by the unilateral action of the Government he filed a Motion to Dismiss the Indictment on the grounds that the deportation of the two (2) women denied him his rights to due process and compulsory process. (D.R. 4) The Respondent requested oral argument on his Motion. The Government filed its Response to the Motion but did not request an evidentiary hearing. (E.R. 15).

In his Motion Respondent alleged that he was denied the opportunity to interview the two (2) alien witnesses by the unilateral action of the Government and, as the result, he was denied his right to compulsory process for obtaining witnesses on his behalf to testify at trial.

At oral argument on Respondent's Motion the Government took the position that the burden was upon the Respondent to show the Court what benefit the Respondent would have derived from the interview and/or testimony of the two (2) material witnesses. (R.T. 17-20) Respondent countered the Government's argument by advising the Court that the law placed upon him no burden to "speculate" as to how the missing material witnesses would have aided his defense. The only requirement of the Respondent to sustain his Motion to Dismiss was to show the Court a "material relationship" between the Defendant and the alleged criminal activity and the unavailable witnesses and that, as the result of this material relationship the Respondent "could conceivably" benefit from the testimony of said missing alien witnesses. (R.T. 20). The Court agreed with Respondents' position as to what transpired between Marquez and the two (2) alien witnesses while "inside the trailer". (R.T. 20)

The Government then ingeniously attempted to convince the Court below that all evidence relating to the Respondent's presence at the trailer should be suppressed and the substantive count dismissed. The conspiracy count against the Respondent would stand however because the confidential informant could testify as to the Respondent's involvement in the negotiations between the confidential informant and Agent Andresano during their phone conversation. When the Court was reminded that intent is an essential element of a conspiracy charge and that the material witnesses "could conceivably" give some evidence as to the intent and/or knowledge of Marquez-Amaya and his involvement at the trailer and that this evidence would relate back to the initial negotiations the District Court agreed and granted the Motion to Dismiss. (R.T. 22, 23)

REASONS FOR DENYING THE PETITION

This case simply follows the well reasoned and constitutionally supported doctrine issued by the Ninth Circuit Court of Appeals in the case of United States vs. Mendez-Rodriguez, 450 F.2d 1 (9th Cir., 1971). There is nothing unique about this case except that the Government is unable to understand that the Sixth Amendment right to compulsory process applies to all criminal activity and not only to "alien smuggling cases". Quite simply, the Government's position is that the Sixth Amendment right to compulsory process should be conditioned upon a showing by a Defendant in a criminal prosecution that the unavailable witness would positively have offered testimony crucial to the defense proposed by a criminal defendant. Of course, the Government can offer no explanation as to how a Defendant might meet this affirmative burden if, in fact, the witness has been made unavailable by the unilateral action of the Government.

1. In United States vs. Mendez-Rodriguez (supra), the Ninth Circuit Court of Appeals quoted the case of Washington vs. Texas, 388 U.S. 14 (1967) as follows:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the Defendant's version of the facts as well as the prosecution to the jury so that it may decide where the truth lies. Just as an accused has a right to confront the prosecution witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental right of due process of law." (450 F.2d at 4)

Therefore, the Ninth Circuit Court of Appeals, in Mendez-Rodriguez (supra), held that the Government's unilateral action in deporting six witnesses to the alleged criminal activity before the Defendant had an opportunity to interview them violated due process and compulsory process requirements.

Further, the Ninth Circuit declined to require a showing by the Defendant that the witnesses would have offered favorable testimony or even speculate as to whether an interview would have proven fruitful. The Court recognized that this burden might well be impossible to meet since the witnesses were "unavailable":

> "Appellant concedes that he is unable to show that the witnesses in question would have offered testimony favorable to the defense. Such statement is understandable in view of the fact that Appellant was, by the Government's action, deprived of the opportunity to interview said witnesses." (450 F.2d at 5)

Later, the Ninth Circuit Court of Appeals held in United States vs. Tsutagawa, 500 F.2d 420 (9th Cir. 1974) that the Defendant was not required to show prejudice resulting from the unavailability of the deported witnesses. In that case the Ninth Circuit stated as follows:

> "Mendez-Rodriguez, prevents the Government from determining who will be a helpful witness for the accused. The accused (or here, prospective accused) has the right to make that decision for himself, either by interviewing potential alien witnesses or by waiving the right to do so. The thrust of Mendez-Rodriguez is to prevent the basic unfairness of allowing the Government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the Defendant. (Citation ommitted) The vise lies in the unfettered ability of the Government to make the decision unilaterally. The Sixth Amendment guarantees the Defendant the right to subpoena favorable witnesses. (Citation ommitted) Here, the Government placed witnesses, who may have been favorable to the Appellee, outside the power of the Court to require attendance. In Mendez-Rodriguez we held that this same act denied the accused due process because it interferred with his ability to defend himself with criminal charges. (Citation ommitted) A defendant has the right to formulate his defense unhibited by Government conduct that, in affect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense." (500 F.2d at 423)

Still later the Ninth Circuit qualified the above general rule even further in the case of United States vs. Gonzales, 617 F.2d 1358 (9th Cir. 1980) wherein they stated that a Defendant must show that he "could conceivably" benefit from the missing

witnesses testimony.

It is the contention of the Government in its Petition for a Writ of Certiorari that the Fifth Circuit decision of United States vs. Avila-Domiguez, 610 F.2d 1266 (5th Cir., 1980), requires a showing of "real prejudice" before a dismissal of the indictment is warranted. That is not the holding of that case. United States vs. Avila-Domiguez, (supra) states as follows:

> ". . . We are in general accord with the proposition set forth in Mendez-Rodriguez and Calzada that to obtain relief in a case of this kind, the Defendant need not show prejudice arising from the violation with any degree of assuredness". (Citation ommitted) But we agree with the dissents in both of those cases that reversal is not warranted where the record is completely devoid of anything which would suggest that the testimony of any one or more of the deported persons would have been helpful to the Defendant. (Citation ommitted) And that it does not seem too much to require that they offer at least a plausible theory of how the testimony of the witnesses would be helpful to the defense. (610 F.2d at 1269 and 1270).

Therefore, what the Government, in its Petition for Writ of Certiorari smugly dismisses as "the vivid imagination of the Respondent's counsel as to possible, but entirely remote, scenarios" is exactly what the Fifth Circuit Court of Appeals in U.S. vs. Avila-Domiguez, (supra) required when they spoke of "at least a plausible theory".

Obviously, unlike counsel for the Government, the trial judge, experienced in the many nuances and theories of criminal litigation, had no problem in recognizing the "conceivable benefit" the missing witnesses could offer to the defense of the Respondent. In response to a question from the attorney for the co-defendant as to why the Motion for Dismissal filed by the Respondent was granted on Mendez-Rodriguez grounds and that of his co-defendant denied the District Court Judge answered as follows:

> "The same material facts didn't operate because the co-defendant was inside there to make a delivery, he could have very well said something to the woman--I've just come across here to carry a bag" or something and there was a strong possibility that we could have had exculpatory evidence for Marquez-Amaya but none for Salcedo and that in that particular case the Government was

> derelict in not holding onto those until after counsel had a chance to discuss them, but you simply don't have that in your case" (T.R. 44)

It is clear, therefore, that this case is not unique and/or confusing with relation to Mendez-Rodriguez and its progeny and/or the guarantees of the Sixth Amendment to the United States Constitution.

2. Secondly, in the Petition for Writ of Certiorari, the Government raises a red herring. At page 8 of the Writ the Government states as follows:

> "In addition, he knew their address in Mexico, but he did no more to secure their presence than state to the Court that they would be unavailable."

In fact, the father of the Respondent attempted to locate the two (2) missing alien witnesses so that Respondent's counsel could interview them. Also, when the Drug Enforcement Administration agent attempted to locate the missing alien witnesses, the Respondent's father furnished them with a previous address for "this woman and her daughter". (T.R. 5) When he attempted to locate them the Respondent's father was told by relatives of the missing "woman" that she had fled to the interior of Mexico because she feared Drug Enforcement Administration Agents. Although these representations as to the fear of the "woman" are not referred to in the official record the Court was made aware of this. In fact it was the Assistant United States Attorney who refers, in the record, to the fact that the Respondent's father was assisting the Drug Enforcement Administration in their efforts to locate the two (2) women. The unsuccessful efforts of the Respondent's father in locating the witnesses on behalf of Respondent's counsel was the support and basis for counsel's statement to the Court that "those witnesses are not going to be available". (T.R. 6)

However, even assuming that Respondent made no effort to locate the missing alien witnesses dismissal of the Indictment was still warranted. The Government proposes that this Court place upon a Defendant the requirement that he "produce an affidavit or other evidence of the testimony the witness would give, or a satisfactory explanation for his inability to do so". Further the Government states that, by imposing this requirement as a precondition to dismissal, this Court would encourage a Defendant's diligence in attempting to locate the missing witnesses. In effect the Government would shift the burden of proof from the Government to the Defendant. This is, of course, contrary to Constitutional mandate. In fact, by not imposing this requirement this Court is discouraging Government law enforcement officials from unilaterally placing potential witnesses beyond the subpoena power of the Court and depriving a Defendant of his constitutionally guaranteed right to "formulate his defense" and determining, for himself, which witnesses would aid in his defense. U.S. vs. Tsutagawa, (supra). The adoption of the standard proposed by the Government could actually encourage law enforcement officers to deprive defendants of exculpatory evidence and thereby subvert the orderly administration of justice. It is not inconceivable that this standard would result in the innocent being "brought to book".

3. In the Petition for Writ of Certiorari the Government next discusses alternatives which were available to the Court other than dismissal of the Indictment against the Respondent. The same argument was presented to the Court below and summarily dismissed as it should have been. At oral argument on the Motion to Dismiss filed by the Respondent the Government suggested that the Court could, in the alternative to dismissal, "suppress all evidence relating to the Respondent's presence at the trailer and his participation in the actual transfer of heroin." (T.R. 19)

In other words the Government would have the trial Court supress all evidence relating to the substantive acts.

Under this proposal the Government could proceed against the Respondent on the conspiracy count contained in the Indictment. This suggestion was hardly a "reasonable solution" as suggested by the Government. This suggested alternative plus the suggested alternative of the "absent witness instruction" again shows nothing more than a basic lack of trial expertise and an attempt to shift the burden of proof from the Government to the Defendant.

It is fundamental that criminal intent and guilty knowledge are essential elements to a conspiracy conviction. U.S. vs. Sheiner, 273 F.Supp. 977, Affirmed 410 F.2d 337, certiorari denied 90 S.Ct. 68, 396 U.S. 825, 24 L.Ed.2d 76. Any evidence the missing witnesses "could conceivably" have provided the Respondent as to his knowledge and intent with relation to the substantive acts would (or could) also necessarily be relevant to the intent and knowledge elements of the conspiracy count. The trial court judge realized this fact and, as a result, refused to accept the Government's offer of a "reasonable solution". Likewise, hollow and fundamentally unfair is the Government's proposal that the Respondent be allowed the "absent witness instruction". Substituting an instruction for live exculpatory testimony may seem a panacea on a theortical level but, in actuality, it is a terribly ineffectual barter.

4. In its final argument the Government seems to propose that the result in this case requires (1) the Government jail all potential illegal alien witnesses "for substantial periods of time" and (2) "plainly guilty defendants" have a lesser right to Constitutional guarantees than do other defendants.

The dilemma of "missing alien witnesses" is not a new or vexing problem as is suggested by the Government. Its origin is rooted in the rapid growth of alien smuggling cases in the early seventies. The manifest injustice of placing innocent witnesses in custody while releasing on bail their smugglers was obvious to all. Federal authorities seemingly had no other choice if they were to

both prosecute the smugglers (the witnesses had to testify at trial as to certain elements necessary to conviction) and protect the Sixth Amendment rights of the Defendant. One proposed solution to this problem is found in 18 U.S.C.A. §3149. This section provides for the deposition of material witnesses and their subsequent release. In fact this measure is effectively being used in the District of Arizona and has been so used since the early seventies.

The advantage in the Government availing itself of 18 U.S.C.A. §3149 is twofold. First it releases innocent witnesses at a relatively early date and eliminates the need for the Government to fill "its jails with non-criminal alien witnesses." It also allows for successful prosecution. Secondly it allows a defendant to have an opportunity to interview the witnesses and object to their release if he decides they are needed to prepare and/or present his defense. That would be sufficient to protect his Sixth Amendment rights. That is currently all the law requires of the prosecution and law enforcement officers:

> "Since we believe, however, that the better procedure for protecting the Constitutional rights here involved would be for the Government to give notice of prospective deportation and a reasonable opportunity to interview the witnesses. . . " U.S. vs. Avila-Dominguez (supra) at 1269

Admittedly depositions of material witnesses which are later used at trial may present problems in relation to the confrontation clause of the Constitution. But that is not the issue in the instant case. If it were, then review by this Court might be appropriate.

Finally the "plainly guilty" argument of the Government is not worthy of response. Although this proposition, unfortunately, may today be politically popular and even accepted and promoted by some of those in political power, it has no support in our system of justice. Hopefully it never will.

CONCLUSION

The issue raised by the Government is illusory only and the Petition for a Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 27th day of November, 1981.

GAMA AND GUERRERO

By _____
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NUMBER_____

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOSE ENRIQUEZ MARQUEZ-AMAYA,

Respondent.

AFFIDAVIT OF SERVICE

PETER A. GUERRERO, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served a copy of Respondent's Response on the United States Attorney for the District of Arizona, Tucson, Arizona, and has forwarded by mail a copy of the following documents to the Solicitor General, Department of Justice, Washington, D.C., on this 27th day of November, 1981.

1. Motion for Leave to Proceed in Forma Pauperis;

2. Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit;

3. Affidavit of Service.

GAMA AND GUERRERO

By Peter Guerrero
PETER A. GUERRERO
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this 27th day of November, 1981.

NOTARY PUBLIC

My Commission Expires:

January 16, 1982